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ALI HASSAN

v.

PERWIRA AFFIN BANK BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SURIYADI HALIM OMAR JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: C-02-260-1999]

C

17 APRIL 2007

CONTRACT: *Guarantee - Consideration - Whether a promise to pay for monies lent - Whether for postponement of winding-up proceedings against company - Whether claim on guarantee succeeded on unpleaded case - Whether delay in written judgment prejudiced*

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The appellant appealed the decision of the High Court made in favour of the respondent on a guarantee executed by the appellant in the sum of RM2,132,043.19. It was the appellant's case that the respondent succeeded on an unpleaded case, ie, that the guarantee was given to obtain a postponement of winding up proceedings against a company called Ghulam Development in which the appellant was a director and shareholder thereof. The pleaded case referred to a guarantee executed in consideration of facilities granted. Also, there was a delay in the preparation of the grounds of judgment by the trial judge that deprived or seriously impaired any audio-visual advantage that the trial judge might have enjoyed.

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Held:

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Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The appellant failed to appreciate the difference between the consideration for a guarantee and its purpose. The former was expressed in the opening clause of the guarantee. The latter emerged in the course of evidence in the trial. The consideration for the guarantee included a promise by the appellant to pay for monies already lent by the respondent to Ghulam Development. That was good consideration. In the circumstances, there was no merit in the point canvassed before the court. (para 5)

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(2) The appellant alleged that he did execute the guarantee at the time the facilities were given to Ghulam Development. The signature on the document relied upon by the respondent was never questioned. The appellant merely contended that the guarantee was being used in a surreptitious manner. The learned judge, having heard the evidence before him, accepted the true purpose for which the guarantee was given. Accordingly, there was no room for complaint on the ground that the judgment came much later than the actual decision on the case. (para 6)

(3) The respondent did not succeed on an unpleaded case. The facts as found by the learned judge were manifestly supported by the evidence before him. Accordingly, there was no misdirection either in law or on the facts. (para 8)

Bahasa Malaysia *translation of headnotes*

Perayu merayu terhadap keputusan Mahkamah Tinggi yang memutuskan halperkara berkaitan satu gerenti yang dimeterai oleh perayu berjumlah RM2,132,043.19 untuk manfaat responden. Kes perayu adalah bahawa responden telah berjaya atas kes yang tidak diplidkan, oleh kerana gerenti diberi semata-mata untuk mendapatkan penangguhan prosiding penggulungan terhadap sebuah syarikat yang bernama Ghulam Development di mana perayu menjadi pengarah dan pemegang sahamnya. Kes yang diplid adalah merujuk kepada satu gerenti yang dimeterai bagi mendapatkan fasiliti-fasiliti yang berkaitan. Dikatakan juga bahawa terdapat kelewatan di pihak hakim bicara dalam menyediakan alasan-alasan penghakimannya, kelewatan mana telah menjejaskan segala manfaat pandang dengar yang telah diperolehi oleh beliau.

Diputuskan:
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Perayu gagal melihat perbezaan antara balasan dan tujuan sesuatu gerenti. Yang terdahulu itu disebut di dalam ungkapan pembukaan gerenti, sementara yang terkemudian hanya akan muncul sewaktu pendengaran keterangan di perbicaraan. Balasan bagi gerenti adalah termasuk apa-apa janji yang dibuat oleh perayu untuk membayar balik wang yang dipinjamkan responden kepada Ghulam Development. Itu adalah balasan yang mencukupi. Oleh hal yang demikian, hujah yang dibangkitkan di sini adalah tidak bermerit.

A **(2)** Perayu mengatakan bahawa ia tidak memeterai gerenti sewaktu fasiliti diberikan kepada Ghulam Development. Namun, tandatangan yang ada pada dokumen yang menjadi pergantungan responden tidak pula dipersoalkan. Perayu sebaliknya hanya mendakwa bahawa gerenti digunakan dengan
B cara yang tersembunyi. Yang arif hakim, atas keterangan yang ada di hadapannya, telah menerima tujuan sebenar gerenti diberi. Oleh itu, tidak ada ruang untuk membantah atas alasan bahawa penghakiman lambat disiapkan berbanding masa sebenar keputusan kes dibuat.

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(3) Responden bukanlah berjaya atas kes yang tidak diplidkan. Fakta-fakta sepertimana yang didapati oleh yang arif hakim disokong oleh keterangan-keterangan di hadapannya. Dengan itu, tidak terdapat apa-apa salah arahan fakta mahupun
D undang-undang.

Case(s) referred to:
Ryan v. Jarvis [2005] UKPC 27 ***(refd)***

For the appellant - Bastian Vendargon; M/s Vendargon & Partners
E *For the respondent - Hon Kai Ping (Khalidah Khalil with him); M/s Raja Azhar & Husain Safri*

[Appeal from High Court, Kuantan; Civil Suit No: 22-37-1995]

Reported by Usha Thiagarajah

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JUDGMENT

Gopal Sri Ram JCA:

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[1] This appeal is directed against the order of the High Court Kuantan entering judgment for the plaintiff (respondent before us) on a guarantee executed by the defendant (appellant before us) in the sum of RM2,132,043.19. A number of grounds have been
H advanced before us in support of the appeal of which only one calls for discussion.

[2] The principal ground on which the judgment under appeal has been attacked is that the plaintiff succeeded on an unpleaded case. It has been submitted by learned counsel for the defendant
I that the pleaded case refers to a guarantee executed in consideration of facilities granted. However, the case as presented to the court below by the plaintiff was that the guarantee was in

truth given in order to obtain a postponement of winding up proceedings that had been commenced. To understand this submission, it is necessary to hearken to some salient facts.

[3] The defendant was at all material times the director and shareholder of company known as Ghulam Development & Construction Sdn Bhd (Ghulam Development). Ghulam Development borrowed money from the plaintiff. This was sometime in 1984. Later it defaulted in its obligations to repay the loan in consequence of which proceedings were brought against it to enforce the security given. The guarantee in question is dated 16 May 1991. The opening clause of the guarantee says this:

> In consideration of I/We having made a request and at my/our desire of you, Perwira Habib Bank Malaysia Berhad (hereinafter called 'the Bank' which expression shall where the context so admits include the Bank successors and assigns) having opened, opening or continuing an account with and having made, making or shall make advance loans or otherwise having given or giving or shall give credit or affording banking facilities and accommodation or not terminating or withdrawing any such advances credit or banking facilities or accommodation already made or given to Ghulam Development & Construction (M) Sdn Bhd of K-124, Jalan Kampung Tengah, Kemaman, Terengganu (hereinafter called 'the customer') for as long as you may at your sole discretion deem fit I/We Ali @ Abdul Aziz b Hassan IC No: 3107413 the undersigned hereby jointly and severally agree with and unconditionally guarantee you as follows that is to say:

[4] Learned counsel for the defendant argues that this is not the true consideration for the guarantee. According to him, the true consideration was the postponement of winding up proceeding against Ghulam Development. With respect we are unable to agree.

[5] The confusion in the defendant's mind is as a result of the failure on his part to appreciate the difference between the consideration for a guarantee and its purpose. The former is expressed in the clause quoted above. The latter emerged in the course of evidence in the trial. As may be seen, the consideration for the guarantee included a promise by the defendant to pay monies already lent by the plaintiff to Ghulam Development. That in our judgment is good consideration. In the circumstances there is no merit in the point canvassed before us.

[6] The other point which we think must mention is this. The trial in this matter concluded on 8 March 1999 when the judge made his order in the plaintiff's favour. He entered judgment for the sum of RM2,132,043.19. The written grounds of judgment were not made available until 27 March 2006. It is the defendant's case that the delay in the preparation of the grounds has either deprived or seriously impaired any audio visual advantage the trial judge may have enjoyed. We must dissent from this submission. In the present case, issues of fact based on credibility were scarce. The defendant alleged that he did execute the guarantee at the time facilities were given to Ghulam Development. The signature on the document relied upon by the plaintiff was never questioned. The defendant merely contended that the guarantee was being used in a surreptitious manner. The learned judge having heard the evidence of PW1 and PW3 before whom the guarantee was executed accepted their evidence. He also accepted the evidence as to the true purpose for which the guarantee was given. Accordingly, there was no room for complaint on the ground that the judgment came much later than the actual decision on the case.

[7] The role of this court in a case such as the present is well settled. We will defer to the findings of fact based on credibility made by a trial court. As stated by Lord Hoffman in *Ryan v. Jarvis* [2005] UKPC 27 when delivering the advice of the Board in an appeal from Antigua & Barbuda:

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

[8] To sum up, this is not a case in which the plaintiff succeeded on an unpleaded case. The facts as found by the learned judge are manifestly supported by evidence before him. There is accordingly no misdirection either in law or on the facts.

[9] For the reasons already given, this appeal fails. The appellant must pay the costs of this appeal. The deposit shall be paid out to the respondent in account of taxed costs. All other orders of the High Court are affirmed.